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No. 702 Misc.

In the Supreme Court of the United States

OCTOBER TERM, 1957

MORRIS H. SWITZER, PETITIONER

v.

UNITED STATES OF AMERICA

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI

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OPINION BELOW

The opinion of the District Court on motion in arrest of judgment and for a new trial (Pet. App. C) is not reported. The opinion of the Court of Appeals (Pet. App. D) is reported at 252 F. 2d 139.

JURISDICTION

The judgment of the Court of Appeals was entered on January 28, 1958 (Pet. App. A). A petition for a rehearing was denied on February 25, 1958 (R. 333a). On March 18, 1958, Mr. Justice Harlan granted an ex-

tension of time within which to file a petition for a writ of certiorari to April 25, 1958. The petition was filed on April 25, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether it was error for the trial court to receive requests for instructions and a motion to dismiss by petitioner's counsel in the robing room in the absence of petitioner, and whether it was error to proceed with testimony after petitioner voluntarily absented himself from the courtroom and the court proceeded only after petitioner's counsel gave permission.

2. Whether the conspiracy count of the indictment was defective.

3. Whether it was error for the trial court to admit, in order to show intent, evidence that petitioner had withdrawn and concealed merchandise before a marshal's sale and disposed of it by private sale.

4. Whether the action of the trial court in asking questions of various witnesses prejudiced petitioner.

5. Whether the trial court erred in refusing petitioner's motion for a new trial on the ground of newly discovered evidence when it was shown that petitioner had part of this evidence with him throughout the trial and had reason to know before the trial that the other part existed.

6. Whether the Court of Appeals erred in affirming six specified actions of the trial court.

STATUTE INVOLVED

Section 152, Title 18, U.S. Code provides in part:

Concealment of assets; false oaths and claims, bribery.

> Whoever knowingly and fraudulently conceals from the receiver, custodian, trustee, marshal, or

other officer of the court charged with the control or custody of property, or from creditors in any bankruptcy proceeding, and any property belonging to the estate of a bankrupt; or

* * * * *

Whoever, while an agent or officer of any person or corporation, and in contemplation of a bankruptcy proceeding by or against such person or corporation, or with intent to defeat the bankruptcy law, knowingly and fraudulently transfers or conceals any of the property of such person or corporation; * * *

* * * * *

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

STATEMENT

On April 19, 1956, in the United States District Court for the Southern District of New York, petitioner was convicted on two counts of a three count indictment charging him with concealing assets from a trustee in bankruptcy (count 2) and conspiring to transfer the assets of one corporation to another in contemplation of bankruptcy with intent to defeat the National Bankruptcy Act (count 3).[1] 18 U.S.C. 152, 371 (R. 310a). Petitioner was sentenced to 18 months' imprisonment on count three, and 18 months on the second count with execution suspended and probation for three years to commence at the conclusion of the prison term under count three (Tr. 1461-1462). The conviction was affirmed on appeal (Pet. App. D).

[1] The first count was directed to a co-defendant and charged him with the crime of using the mails to defraud.

The evidence may be summarized as follows:

Petitioner was the attorney for Berkeley Jewelers, Inc., which conducted a retail business selling jewelry, clocks, radios and other electric appliances (R. 7a, 8a, 16a). The business was located on the second floor of a building in Manhattan where its merchandise was displayed (R. 7a). On February 2, 1950, an involuntary petition in bankruptcy was filed in the United States District Court for the Southern District of New York praying that Berkeley Jewelers, Inc., be adjudicated bankrupt. On February 20, 1950, the corporation was adjudicated bankrupt and a trustee was elected and qualified to act on behalf of the estate (R. 1a).

The evidence showed that beginning in 1948 Berkeley Jewelers, Inc., began to borrow substantial sums of money from various lenders, most of whom were represented by the petitioner (R. 11a, 12a, 93a, 94a, 117a, 122a, 136a, 145a, 174a). In December 1949, petitioner, who admittedly was aware that Berkeley Jewelers, Inc., was on the verge of bankruptcy, proposed a plan whereby the bulk of Berkeley's inventory would be transferred to a new corporation (Berkeley Pennsylvania) to be managed for the benefit of those creditors who were also petitioner's clients (R. 48a, 53a, 57a, 99a, 100a, 101a, 128a, 228a-230a).

On December 15, 1949, pursuant to petitioner's plan, Faskow, the bankrupt's president, signed four confessions of judgment ($1,000 each) in favor of two clients of petitioner who had lent money to Berkeley, Inc., several months before (R. 3a, 58a, 59a, 127a, 128a). Judgments were entered, executions issued, and a sale was noticed (R. 60a, 151a, 152). Prior to the judicial sale, however, petitioner removed much of the valuable inventory from the shelves and cases in the showroom

and stored it in friends' homes, in the storeroom at the rear of the showroom, and in the safe which was on the premises but not subject to sale (R. 66a, 103a, 104a, 178a, 179a, 209a, 212a, 231a). Consequently, on the day of the sale, there was displayed to prospective buyers only that part of the bankrupt's stock which was on display in the showrooms (R. 154a, 155a). The entire lot of merchandise was sold for $1,300 to a relative of petitioner (R. 121a, 132a, 158a, 159a, 182a, 185a). After the sale, there was removed from the premises not only the merchandise that had been displayed, but also that which had been locked in the storeroom (R. 68a-70a, 104a, 105a, 218a-220a; Pet. 72). Some of the property was sold for the benefit of the favored creditors and petitioner, and some went to the newly organized corporation (Berkeley Pennsylvania Corporation) (R. 77a, 106a-108a, 180a, 181a, 189a-192a; Tr. 724).

Sometime in May 1950, petitioner, with the permission of the attorney for the trustee in bankruptcy, visited the premises of the old corporation to try to sell the fixtures and safe. The elevator operator who let petitioner into the building testified that he saw petitioner remove some trays from the safe and take them with him when he left (R. 234a). Mr. Frier, attorney for the trustee in bankruptcy, testified that he was notified that petitioner had removed some trays of jewelry from the safe and that petitioner put them under his coat and left the building. After hearing this, Mr. Frier telephoned petitioner and demanded the return of the jewelry (R. 239a). Petitioner did not turn this jewelry over to the trustee or his attorney prior to petitioner's arrest on May 31, 1950 (R. 239a-240a).

Petitioner testified that he had helped Berkeley

Jewelers, Inc., obtain loans and that much to his surprise in December 1949 he learned that the firm was almost bankrupt (Tr. 886, 895, 897, 899, 900, 901, 922, 931). Mr. Faskow told petitioner that he was working on a deal that would save the firm from bankruptcy (Tr. 932, 933). In order to get time in which to negotiate the deal, confessions of judgment were given to certain creditors at petitioner's suggestion (Tr. 932, 933, 934, 935). Mr. Faskow's deal fell through, however, and judgments were entered on the confessions (Tr. 938, 939). The only merchandise removed prior to the sale was th[illegible] which belonged to the Bucknell Trading Company. The merchandise sold at the marshal's sale was turned over to the trustee later (Tr. 942, 943, 945, 958, 960). Concerning the second count (concealing property from the trustee), petitioner testified that he received permission from the trustee to enter the premises of Berkeley, Inc., to provide for the removal of the fixtures, and that while examining the safe he found several trays of cheap jewelry which he removed for safekeeping (Tr. 772, 880, 881, 1008-1012). A telephone conversation then took place between the attorney for the trustee and petitioner, during which the merchandise taken from the safe was discussed, and petitioner agreed to write a letter to the attorneys for the trustee explaining everything (Tr. 1012-1013). Before the letter could be mailed, however, petitioner was arrested. A copy of the letter was given to the arresting agents and never shown to the attorneys for the trustee (Tr. 806, 807, 808, 1013-1016).

On October 11, 1957, a few months after his conviction, petitioner filed a motion in arrest of judgment and for a new trial as to the second count (Pet. App. C). The petitioner alleged that he had discovered new

evidence which altered the facts upon which the jury based its verdict of guilty and, if introduced, the evidence might have convinced the jury that he was innocent of the charge in count two and conceivably affect their verdict on the third count (Pet. App. C-73). The evidence, claimed to be newly discovered, consisted of (a) testimony by the elevator operator in the old corporation's building at an examination before the Bankruptcy Referee in 1950 in which he did not say, as petition alleged he testified at the trial, that petitioner put under his coat the merchandise he removed from the safe; and (b) a letter addressed to petitioner by a lawyer in the trustee's office concerning some of the merchandise of the old corporation (Pet. App. C-75). The trial court denied the motion, holding that neither the letter nor the testimony was newly discovered because petitioner had the letter with him throughout the trial, and because before trial petitioner knew or had reason to know that the elevator operator was examined in 1950 (Pet. App. C). Moreover, the court found that the testimony attributed to the elevator operator was not his at all, but that of Mr. Frier.

ARGUMENT

1. While the jury was viewing evidence submitted by the prosecution, the petitioner, after notifying the court, left the courtroom for approximately two minutes. When the jury finished and the trial was about to resume, the judge, noticing that the petitioner had not yet returned, asked defense counsel "can we go ahead before he gets here * * *" (R. 51a, 52a). Defense counsel replied "[I]t is perfectly all right" and the witness went on with his testimony (R. 52a). Also, at the close of the trial the judge, while in the robing room and in the absence of petitioner, discussed with counsel for

each side the charges he would give to the jury, and petitioner's counsel renewed a motion to dismiss. Petitioner contends that the trial court in conducting these parts of the trial in his absence denied him the right under the Fifth Amendment to be present at every stage of his trial (Pet. 30-39).

Petitioner cannot complain of any deprivation of rights resulting from his first absence because that was at his own request and it was only after obtaining express permission from defense counsel that the court permitted the witness to continue testifying. Furthermore, the action that took place in the robing room did not deprive petitioner of a fair and just hearing. The Fifth Amendment requirement that the defendant be present at his trial is to afford him a full opportunity to advise with counsel and defend himself. This privilege, however, is not all-inclusive and is not applicable where the defendant's presence would be useless (see *Snyder* v. *Massachusetts*, 291 U.S. 97) as, for instance, where mechanical or formal functions are performed by counsel. *Schwab* v. *Berggren*, 143 U.S. 442; *Lewis* v. *United States*, 146 U.S. 370.

Neither *Shields* v. *United States*, 273 U.S. 583, nor *Ah Fook Chang* v. *United States*, 91 F. 2d 805 (C.A. 9), is applicable in this case. In those cases, the defendant's constitutional rights were violated when the court actually gave instructions to the jury out of the hearing of the defendant. In the instant case, the judge did not give any instructions in the robing room. He merely informed counsel as to the instructions he would give to the jury in open court. Petitioner was present when those instructions were given and had opportunity to suggest to counsel any objections he might have.

2. Petitioner contends that, in accordance with the 1948 amendment to 18 U.S.C. 152, the third count of

the indictment was defective in that it did not charge that petitioner conspired to "knowingly and fraudulently" transfer the property of Berkeley Jewelers, Inc. (Pet. 39-40). The words "knowingly and fraudulently" were unnecessary. This Court has said that an indictment for conspiracy need not allege with technical precision the elements of the crime that is the object of the conspiracy. If the indictment informs the defendant of the nature and cause of the accusation, and enables him to make a proper defense, it will be upheld. *Wong Tai* v. *United States*, 273 U.S. 77; *Thornton* v. *United States*, 271 U.S. 414. The third count of the indictment in question fully informed petitioner that he was indicted for conspiracy to defeat the National Bankruptcy Act by transferring the assets of one corporation to another in contemplation of bankruptcy.

3. During the trial, evidence was introduced showing that in furtherance of the conspiratorial intent some merchandise, concealed and withdrawn by petitioner before the marshal's sale had been disposed of by private sale (R. 68a, 69a, 70a). Petitioner contends that this was evidence of a distinct and independent crime and was improperly admitted. The evidence of the concealment of this merchandise was properly introduced to show that petitioner intended fraudulently to withhold goods from the creditors in the bankruptcy proceedings. Much latitude is permitted a court in the admission of evidence that goes to prove a conspiracy and, as the court of appeals held (Pet. App. D-83) in this case, it was reasonable to admit such testimony as an act having some bearing upon the intent of petitioner to defeat the bankruptcy laws. *Garrison* v. *United States*, 135 F. 2d 877 (C.A. 5), certiorari denied, 320 U.S. 751.

4. During the trial, the court, on numerous occasions, asked questions of the witnesses and admonished the petitioner and his counsel. This conduct of the trial court, petitioner contends, deprived him of a fair and impartial trial (Pet. 50). The trial lasted 11 days and required 1,470 pages of transcript, 399 pages of which were petitioner's testimony. Petitioner was repeatedly evasive and unresponsive and the trial court was called upon to keep the proceedings moving (Tr. 887, 936, 940, 1021, 1030, 1031, 1032, 1033, 1036, 1037, 1048, 1052, 1070, 1080, 1088-1089, 1100, 1101, 1103, 1109, 1110, 1111, 1114, 1127, 1144, 1146, 1153, 1154, 1163, 1167, 1176, 1180, 1187, 1193, 1196, 1211, 1260, 1268). Thus, when put in its proper perspective the action taken by the trial court was not that of a public prosecutor, as alleged by petitioner, but that of an impartial and unbiased referee attempting to get a clear presentation of the issues. See *United States* v. *Giallo*, 206 F. 2d 207 (C.A. 2), affirmed, 346 U.S. 929. Moreover, during the cross-examination of petitioner the court cautioned the jury that its comments to the defendant had nothing to do with the issues in the case (Tr. 1181, 1182) and in its charge to the jury the court stated (R. 291a):

> You must not draw any inferences for or against any party because of any rulings that I have made * * *. Then I must call your attention again to what I said to you during the trial. You remember while Mr. Switzer, the defendant, was on the stand I had occasion two or three times to admonish him not to be so expansive in his answers, to answer a little more sharply the questions that were put to him. That was in no sense an indication that I felt that Mr. Switzer was not trying to answer truth-

fully * * *. But it is something that you should put completely out of your minds. * * *

Further, you must not infer from the fact that I asked several questions that I have any opinion as to the facts of the case. * * *

5. Petitioner contends that the trial court erred in denying his motion for a new trial on the ground of newly discovered evidence which consisted of (a) testimony of the elevator operator given at an examination before a bankruptcy referee six years before the trial, and (b) a letter addressed to petitioner from a lawyer in the trustee in bankruptcy's office which petitioner admitted he had with him throughout the trial (Pet. 52).

Through petitioner's own admission the letter was not "newly discovered," and thus the trial court was not in error in refusing a new trial on such evidence. Moreover, the trial court rejected petitioner's "involved" theories as to why this testimony was relevant (see Pet. 22-24), finding petitioner's contention "wholly unpersuasive" (Pet. 75). The letter at best did nothing more than tend to impeach the testimony of Mr. Frier and that is not a sufficient reason to grant a new trial. *United States* v. *Hiss*, 107 F. Supp. 128 (S.D. N.Y.), affirmed, 201 F. 2d 372 (C.A. 2), certiorari denied, 345 U.S. 942. As to the 1950 testimony of the elevator operator, the trial court, after listening to argument and observing the petitioner and the other witnesses, concluded that it was unbelievable that the petitioner first learned of such testimony only after the trial (Pet. App. C-76). Moreover, the testimony attributed to the elevator operator that he saw petitioner take something from the safe and put it

under his coat was, as shown by the trial court, given by Mr. Frier, not the elevator operator (Pet. C-75). In any event, all that could be shown by the 1950 testimony would be that the elevator operator did not then say that petitioner put the material under his coat—testimony not necessarily inconsistent with statements that petitioner had done so.

6. (a) Any possible prejudice resulting from giving the indictment (containing count one which was not directed against petitioner) to the jury was dissipated by the court's clear and complete instructions to the jury that (R. 295a, 296a):

> The defendant, Morris Switzer, is charged here with two crimes. The first charge is set out in the second count of the indictment, and the second charge against him is set out in the third count of the indictment. * * *
>
> * * * * *
>
> Bear in mind that these two offenses are the only offenses with which the defendant Switzer is charged * * *. So I repeat, you have only to pass on the two charges which have been made by the grand jury here in this indictment, namely, the charge that he knowingly and fraudulently concealed property belonging to the bankrupt from the trustee, and, secondly, that he conspired with others in contemplation of bankruptcy knowingly to transfer property of the corporation.

(b) Petitioner contends that it was error to allow the prosecutor to make use of petitioner's statement after his arrest during cross-examination and then refuse a defense motion to admit the document as a whole under the "completeness doctrine" (Pet. 37). There are two requirements to the application of that

doctrine that petitioner has not mentioned. In order to introduce the remainder of a document introduced in evidence by the prosecution it must appear that the remainder is relevant to the issue and that the remainder is explanatory of the first part of the document and not merely supplementary (Wigmore, *Evidence*, 3d ed. §§ 2094, 2113). Petitioner did not attempt to show the trial court (Tr. 1278-1279), and he has not shown in his petition, that the remainder of the document sought to be introduced by him meets either of these requirements.

(c) In his summation, the Assistant United States Attorney read part of petitioner's testimony before the grand jury. Previously the petitioner had been confronted with this testimony on cross-examination and his counsel stipulated that the grand jury stenographer, if called as a witness, would testify to the accuracy of the excerpts (R. 273a, 274a). Petitioner contends that it was error for the trial court to allow the prosecutor to use excerpts from those minutes in his summation because they were never actually put in evidence as such. However, when the prosecutor repeated these excerpts he was merely restating the cross-examination, and was not reading from something that was not in evidence.

(d) During the course of the trial, the prosecution asked five witnesses if, when they testified before the grand jury and the referee in bankruptcy, they testified untruthfully and each witness answered "Yes" (Pet. 61). Petitioner contends that these questions were improper because they called for conclusions rather than facts. Whether these witnesses testified truthfully is a fact peculiarly within the knowledge of the

witness and such an answer does not infringe upon the function of the jury by asking for a conclusion.

(e) Three days before the trial ended, the defense, petitioner alleges, made a motion for a continuance in view of the fact that one of its witnesses was ill and would not be able to testify for a week (Pet. 63, 64). The trial court denied the motion and this, contends petitioner, was error. The record discloses no motion for a continuance (Tr. 1054-1066). In fact, petitioner's counsel, when confronted with the absence of the witness, said "I don't know what to do" (Tr. 1059). Finally, petitioner's counsel stated that "the defendant Switzer will be satisfied if the court instructs the jury or informs the jury that the witness, Nat D. Shapiro, was subpoenaed by the defendant to appear this morning and that a communication came in by registered mail addressed to the Court advising the Court that Mr. Shapiro is under the doctor's care and that he cannot appear at least for the rest of the week" (Tr. 1065). The court agreed and at the end of the trial that statement was read into the record before the jury. (Tr. 1284-1286). Since petitioner's wishes were complied with, he has no ground for complaint.

(f) Petitioner did not object in either the trial court or the court of appeals to the failure of a government witness to produce documents pursuant to a subpoena. Petitioner has not shown that at the trial he requested the documents and he has not shown that he was prejudiced by this failure.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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